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No. 113.

Brf. (arg.) of Stocking for Coffman

IN THE

United States Supreme Court.

No. 113.

Filed Jan. 19, 1900.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,

vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Argument for Coffman, Appellee.

E. B. STOCKING,
Counsel for Coffman.

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ARGUMENT FOR COFFMAN, APPELLEE.

MAY IT PLEASE THE COURT:

What is the mark?

The gravamen of the bill, of the entire evidence and of the brief, of the complainant appellant is that the trade mark involved in this cause consists solely of the word "Pocahontas."

To what is the mark applied?

The mark is applied to coal, a natural product. As stated by Judge Goff in the opinion of the court of the 4th circuit:

"An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit was instituted thirty-eight different coal and coke companies were operating in the field, all of them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the 'Pocahontas Flat Top Coal.' For the manufacture of coke over five thousand ovens had been constructed, and were in use. During the year 1883, ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing, until in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market. For the purpose of illustrating the almost inexhaustible resources of the field, it may be stated that at this rate of production—as shown by the returns for the year 1894—it would require about five hundred and forty-eight years to exhaust the seam now being worked. *And it is as to this entire body of coal that the complainants claim the exclusive right to use the word Pocahontas as descriptive of its origin and quality.*"

Natural Product Trade Marks.

From the nature, characteristics and quality inherent in natural products there arises, from necessity, a positive requirement that the rules of law pertaining to trade marks in general must be more rigidly and somewhat restrictively applied. For this reason the rules and authorities given in cases relating to trade marks for articles of manufacture must be materially modified in their application to a case involving a natural product even if they be at all applicable thereto. Articles of manufacture are entirely the product

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of the hand of man. The question of the material employed in their construction or composition is a minor element and any preference on the part of the public is caused by the work of the manufacturer. The individuality of the producer of an article of manufacture is far more fully and completely embodied therein than is possible in the case of a natural product.

Two dealers in coal enter the same bed or seam and each emerges with a given quantity of the natural product of that bed or seam. At this time these two dealers stand in the market of the world upon a plane of absolute equality and the only medium for the exhibition of the individuality of each of these two dealers is in the matter of eliminating inherent impurities in the natural product. It follows then as an unquestionable fact that the only matter to be indicated by a trade mark on a natural product is inspection of that product. Therefore any word, symbol, sign or mark applied to a natural product which can possibly receive protection in regard to its exclusive use must indicate the individuality of the inspector. It must identify one inspector from another dealing in the same natural product.

In articles of manufacture, the common people are experts to a sufficient degree that by an inspection of the article or of the label thereon, bearing the trade mark, they can determine the individuality of the producer, but in the case of a natural product the experts are practically limited to the inspectors at the mine and the dealers in the product. This and other important reasons lead to the inevitable conclusion that a trade mark applied to a natural product must receive a legal consideration and treatment materially different from a trade mark of an article of manufacture. It follows therefore also that the numerous decisions of the courts in trade mark cases involving articles of manufacture are in a great majority of cases inapplicable to the case at bar.

"Pocahontas" *Per Se* Unobjectionable.

The word "Pocahontas" as a trade mark or as a trade mark for coal is not *per se* objectionable. The complainant has a right to the use of that word in connection with the word "coal" as a trade mark. Defendant and each and every operator in the Pocahontas coal field, also possesses the right to use that word in the same manner and for the same purpose. The objection to the word as an exclusive trade mark is that it was and is the name of the locality where the coal is produced.

The Time and Purpose of Adoption.

This subdivision of this cause requires a statement of the history of the development of the coal industry in the Pocahontas coal field. It is the actual gravamen of the entire record that the word Pocahontas was first adopted as the name of the locality, and that it was so adopted for that purpose before any coal was ever shipped from that locality. Furthermore that a post office was established at that locality and named Pocahontas officially by the Post Office Department of this Government *thirteen months* before any coal was ever shipped from that locality. The consensus of the entire record substantiates the application of the word Pocahontas to the locality long prior to its application to the product of that locality. Complainant's record establishes these facts.

Mr. Kimball, president of the N. & W. Ry., one of the most important and intelligent of complainant's witnesses, states on page 54 explicitly:

"That the mines of said Southwest Virginia Improvement Company were opened and developed early in the year 1882, and before the middle of said year, but coal was not shipped in large quantities until the completion of the

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branch of the Norfolk and Western Railroad Company to the coal field and mine openings, designated the "East" mine and "West" mine, which was in the year 1883; that prior to the building of this branch railroad and opening of the said mines, this section of the country was a wilderness; that deponent remembers the history of these early transactions, because as an officer of said Norfolk and Western Railroad Company he was interested in developing traffic for his railroad from the said mines; *that sometime about the middle of the year 1882, the said Southwest Virginia Improvement Company called their settlement and post office* Pocahontas and *upon the completion of the branch of said road* the station was called 'Pocahontas,' and the coal mined and marketed under the name and style of 'Pocahontas' coal."

This witness makes a second affidavit on page 134, closing with the following sentence:

"*Prior to the opening* of the mines of the Southwest Virginia Improvement Company, coal was not known to exist in any quantity in this region, and being a wilderness, remote from railways, and *without even carriage or wagon roads*, and practically without population, this *section* of country had no distinctive designation."

It is conceded that prior to the *opening* of the mines, which was in the middle of 1882, this *section* of country had no distinctive designation and that it did not have even carriage or wagon roads. Consequently no coal could possibly have been shipped by any means prior to July 30, 1883. (Collins Receipt, p. 59.)

Kimball is corroborated by the history published in "The Iron Belt" of October, 1891, as given on page 99 of the record, which shows that only surface work was done in 1881; that in January, 1882, about 20 miners were landed at the point in Tazewell County where now stands the town of Pocahontas, then a howling wilderness.

"The wet season in the spring of 1882 retarded the progress of the work *which was all out of doors*, but in March, that year the first blast was put into the East mine and on April first, Mr. Thomas C. Blair, now a successful capitalist of Roanoke, Va., closed a contract with the Southwest Virginia Improvement Co. to run the No. 1 east mine one mile, also the air course and the number 1 west mine. The work was then pushed with vigor till fall when it was stopped for a time on account of *the inability of the railroad to reach the mines*, in consequence of all the coal taken from the mine being dumped in front of the opening."

On the contrary, Samuel Castner, Jr., a member of the complainant corporation, deposes under oath, on page 13, as follows: "that *during the year 1882*, the said Southwest Virginia Improvement Company *began* to sell its coal under the purely fanciful and arbitrary name of Pocahontas, and called its mine the Pocahontas mine, and founded a town, which it also called 'Pocahontas.'"

With all due respect to this witness it must be held that his deposition upon this point can have little weight because he, the same Samuel Castner, Jr., when a member of the firm of Castner & Co., Ltd., predecessor of the complainant, positively stated under oath, as an applicant for a registration of the word "Pocahontas" for a trade mark for coal, that said trade mark had been used by his said corporation since about *January 1, 1885* (p. 69 of record) and that (p. 70 of record) at this time—to wit, August 21, 1885—his said corporation "has a right to the use of the trade mark, that *no other person, firm or corporation has the right to such use* either in identical form or in any such near resemblance thereto as might be calculated to deceive." Ten years after this application was made and registration secured, the same Samuel Castner, Jr., a member of complainant corporation, took an alleged title to said mark by

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way of an alleged assignment from the Southwest Virginia Improvement Company, so that this witness for 10 years claimed in his own right the exclusive use of the word Pocahontas as applied to coal and subsequently—to wit, in 1897—he deposes for the information of this Court that the Southwest Virginia Improvement Company *began selling* their coal in *1882* under the purely fanciful and arbitrary name of Pocahontas and called its mine Pocahontas. Kimball above quoted and the "Iron Belt" above quoted show that the mines were known as the No. 1 East Mine and the No. 1 West Mine and the latter exhibit in giving the history of the Southwest Virginia Improvement Company (p. 104 of record) mentions the mines "three in number— 'No. 1 East,' 'No 1 West' and the 'Baby'—are located about one-half mile from the town of Pocahontas, on Laurel Creek."

From the above it is unquestionable that no coal was produced in 1881; that 20 miners was the extent of the force employed in the forepart of 1882; that in the middle of 1882, or, as stated by the Honorable Court in the fourth circuit, on *June 30, 1882*, the postoffice was established as Pocahontas; that in 1882 the mines were known as "No. 1," "No. 2," and "Baby" mine; that the *first blast* was in March, 1882; that prior to that time there were not even wagon roads, and that the railroad was not completed to Pocahontas until *1883*, and that the first coal was shipped *July 30, 1883*. It is to be noted particularly that Mr. Kimball, on behalf of the complainant, states "that the Southwest Virginia Improvement Company named *their settlement* and *postoffice* Pocahontas, but they did *not* name their *mines* "Pocahontas." It is therefore established fact that the word "Pocahontas" was *dedicated to the public* as a geographical name, and the Southwest Virginia Improvement Company could not thereafter recall such dedication and readopt the

word as a trade mark for coal. *The word Pocahontas was and is the name of a locality.* To-day Pocahontas is a city of 4,000 population ; to-day Pocahontas is known the world over as the distinctive name of a peculiar and distinctive quality of steam-making coal, and it is a question whether or not it is possible to give the word at this day and date any other significance than that of a locality and of a natural product of that locality.

Complainant's Title to Mark.

The first instance, in order of time, of a claim of the complainant to the exclusive use of the mark was 1885, when their predecessors, Castner & Co., Ltd., applied for a registration of the mark. The next instance, in order of time, of such a claim was in 1895, *ten years after* applying for the registration. This claim is by way of assignment from the Southwest Virginia Improvement Company (Exh. B., p. 10 of record.)

This assignment is null and void—

(*a*) Because the word had already been dedicated by the company to the public as the name of a locality.

(*b*) Because its use as a trade mark by others than the company would be deceptive, as it can in connection with the coal to which it is applied indicate nothing more than inspection of that coal. In addition to this the assignment pretends to carry the mark and apply it to *any and all coal* sold by the complainant.

(*c*) The mark has been thus deceptively employed by the complainant (see bill of complaint), and that without notifying the public that they are the successors, so far as the trade mark is concerned, of the Southwest Virginia Improvement Company.

(*d*) There has not been such an exclusive use of the mark by either the Southwest Virginia Improvement Company or

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the complainant or their immediate predecessor as would confer upon them an exclusive use thereof, because from 1885 to 1895 the mark was *simultaneously* used by the complainant and its immediate predecessor and by the Southwest Virginia Improvement Company, and from 1894 to the present time there have been at least ten other users of the mark in connection with the same coal (see letter heads, Rec., p. 112.)

It clearly appears from the above that in neither line of title is there the foundation of any right in the complainant to the exclusive use of the word Pocahontas as a trade mark for coal produced in the Pocahontas Flat Top Coal Field.

It also follows from the above that the Honorable Court in the first circuit, which laid such stress and importance upon the alleged fact of 20 years' continuous exclusive use of the mark by complainant, was misled in a very material matter, but even if the complainant had exclusively employed the word "Pocahontas" as a mark, continuance of use cannot confer validity upon an illegal and improper trade mark. Even if the Southwest Virginia Improvement Company did first apply the word to their mines and their coal before it was applied to the locality as the name thereof, this can give them no exclusive title to its use for a natural product of that locality. This question was fully and clearly determined in the case of the Glendon Iron Co., where the word was actually first employed as an arbitrary trade mark and afterwards became the name of the locality, while in the Lackawanna case the name of the locality had been used as a mark for over 40 years.

It is fair to conclude at this point of the argument that a permanently settled rule of law, that the name of a locality shall not be monopolized by one individual firm or corporation as a trade mark for products of that locality, would require, in any case asking for a modification of that

rule, the most convincing proof of a certain, positive and *wholly satisfactory reason* for requesting such a modification. The burden of proof of *that character* is upon the complainant, while the evidence shows clearly a prior adoption and application of the alleged mark as the name of a locality and the title to the mark set up by the complainant has a cloud on it, so that it is fair to say that in neither of these matters is there presented to the Court a sufficient reason for making an exception to the rule.

Inspection.

Appellant alleges immense expense in establishing and carrying on a rigid system of inspection whereby their coal has been made far superior to that of any other producer in the same field (p. 31). What are the facts?

The facts are that a selfish interest alone would compel each individual operator to inspect his raw product so as to bring it up to a marketable standard and condition. It is natural to assume that all of the 38 or more operators in the Pocahontas coal field are controlled by this motive. Before Castner & Curran entered the field—

"about April 1st, 1895, coal in the Pocahontas field had been inspected, and since Mess. Castner & Curran have undertaken to regulate that inspection, in April, 1895, there has been no change either in the grading or verification of the product. That the operators in the field furnish the men who perform the work of inspection; that these men are common laborers, as well as the sub-inspector, who acts as foreman at each tipple in the Pocahontas district, and are carried on the payrolls of the several companies themselves, with the exception of the foreman and chief inspector. In addition to that, a charge is made on all coal operators by Castner & Curran of about 1 cent per ton to cover the cost of inspection." (Collins, p. 125.)

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Regardless of the fact as to who established this system of inspection, which fact is immaterial, it is clear from the above quotation from the record that the system consists in the provision of helpers or laborers, four in number more or less as is required at each tipple, which laborers are under a foreman and each foreman is under a chief inspector. The helpers are provided, and paid for, by the mining companies whose coal they inspect, and they represent their companies to see that no good coal is thrown out. On the other hand these helpers are under the supervision of the foremen to see that not more than 60 per cent. slack or fine coal and not less than 40 per cent. of lump coal is loaded at the tipple into the car. Furthermore the foreman is under the supervision of the chief inspector, who goes from tipple to tipple throughout the field to see that the foremen perform their duties. While the helpers are selected by the mining companies, the foremen and chief inspector are selected by Castner & Curran and the companies pay one cent per ton to Castner & Curran. Now, Mr. Curran testifies on page 15 that they sell about three million tons yearly. One cent per ton amounts to $30,000. Allowing 150 persons for the work at the usually low rates paid therefor in mining sections, a fair estimate will make the expense approximate $25,000, leaving a net profit to Castner & Curran of $5,000 per year on their alleged expensive system of inspection alone, and in addition to the 15 cents per ton allowed them as commission as sales agent.

By referring to the deposition of Mr. Botsford (p. 126), General Manager of the Indian Ridge Coal and Coke Company, the product of whose mines the defendant sells, which product previous to November 1, 1896, was sold by complainant as Pocahontas coal, and to the deposition of Mr. Kilpatrick, president of the same company (p. 128 of record), it will be found that the system of inspection of the coal since

defendant has been selling the same is identical with the system which existed when complainant sold the coal, with the exception that the foreman who formerly worked for Castner & Curran was employed during the time that defendant sold the coal for a period of about two months, when he was discharged, and subsequently appears as a witness for the complainant and deposes that the coal sold by defendant is very inferior in quality (Wilcox, p. 39). It will be found from the deposition of Mr. Botsford that the mining of the coal is carried on now as it always has been, and so far as known has met the complete approbation of the Engineer of the Flat Top Coal Land Association, whose duty it is to see that the different operators mine their coal properly and in accordance with the terms of their leases. It is fair to assume that those terms require proper mining and proper inspection.

It is fair to conclude from the argument as thus far advanced that neither the purpose of the *primary* adoption of the alleged trade mark "Pocahontas," nor the title to the exclusive right to the use of said mark in the complainant, nor the exclusiveness of such use of such mark, nor the alleged expensive system of inspection have been established either collectively or singly to such an extent as to warrant or require a modification of a rule of law so well established as is the rule prohibiting the exclusive appropriation of the name of a locality as a trade mark applied to a natural product of that locality.

The solidity of the foundation and the clearness of the outline of the rule prohibiting monopoly in a geographical name as a trade mark are so fixed in the mind of the commercial world that it stands as a beacon light observed by all, and it is most respectfully and urgently pressed to the attention of the Court that there is insufficiency of reason disclosed in the complainant's case for changing either the

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foundation or the outline of that standard regulation of the relative rights of competitors in the commercial field.

Unfair Competition.

An essential division of the case at bar is the question of whether or not the complainant has made out a case of unfair competition. It is recognized that the gist, the essential element, of unfair competition is the selling of one's goods for those of another. As before stated, the trade mark in this case is applied to a natural product and in the very nature of the product to which it is applied it, the trade mark, can have reference only to the matter of inspection. Regardless now of the question of the validity or invalidity of the mark itself, which is not an essential matter in a charge of unfair competition, it must be *shown* that the defendant, appellee, has offered his goods with either one of two false representations, to wit: "This is Castner & Curran's coal that I am offering to you," or "this coal that I am offering to you was inspected by Castner & Curran."

One may search the record of this case in vain for a single instance of either of these two false representations. The gravamen of the record and of complainant's brief is that defendant has represented his coal as "*Pocahontas*" coal, and has thereby misled and may mislead the public in believing that it is purchasing Castner & Curran's coal. The quality of coal sold by defendant may be ever so inferior, and so long as he does not represent it to be the complainant's coal or coal inspected by complainant, there is no wrong attending its sale. But the record shows conclusively that defendant's coal is as good and in some instances preferable to that of complainant's. (See commendations, pp. 122 to 124, inclusive.) Reference might be again made to the careful inspection given to the coal, as rehearsed by Botsford (p. 126), and by Kilpatrick

(pp. 128 and 129) and note particularly the fact in the latter deposition that complainant has made an effort to regain the agency of this coal since defendant has been selling it, and even at that late date made no mention of the coal's being of an inferior quality. Note also the character of the witnesses employed by the complainant to establish unfair competition and inferiority of product. They seem, in every instance, to be a sub-sale-agent, an employee of or a party in interest with the complainant in the issue of this cause.

Complainant's and Defendant's Coals the same.

From a reference to the depositions of mining engineers Cope (p. 132), Welsh (p. 125), and Paddock (p. 133), it will be found that the number 3 bed coal, commonly known as the Pocahontas Flat Top Coal, is the only vein or bed which is mined in that field and is the coal sold by Castner & Curran. These being facts appellee has the undoubted right to say he is selling the same coal that Castner & Curran sells, but turn to Exhibits J and K (p. 29), Exhibit I (p. 30) and Exhibit R (p. 42) and learn exactly what the defendant has said to the trade in regard to his coal:

"All mines now producing in the Pocahontas Flat Top district are working the same vein of coal" (p. 30).

"Since November 1st we have been, are now and will continue to sell the Pocahontas coal, which is mined in the Pocahontas Flat Top coal district. These mines have been operated for several years, and it is highly probable that the best Pocahontas coal which Pocahontas consumers have been receiving has been shipped from our mines" (p. 31).

Exhibits O and P (pp. 47 and 48) are emphasized by the appellant. Exhibit O says: "Pocahontas smokeless coal constantly in transit," and "Get the genuine article from yours truly, F. B. Newell & Co., 355 Dearborn St., Ellsworth

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Bldg., Chicago, northwestern distributors." It further says: "When you get Pocahontas smokeless coal you get the best product of the celebrated Flat Top West Virginia district." Exhibit P, issued by the same firm as Exhibit O, reads "Pocahontas Coke and Coal Co.'s celebrated coal constantly in transit."

These extracts from advertising devices fail to show that defendant has represented his coal as Castner & Curran's coal or coal inspected by Castner & Curran. Certainly if the Indian Ridge Company's coal was "Pocahontas" coal when sold by the complainant, it must have been "Pocahontas" coal when subsequently sold by the defendant.

Subsequent Correspondence.

By reference to complainant's record, and particularly to the depositions of Calfee (p. 40), of Sayers (p. 41) and of Stockham (p. 42), it will be noted that each deponent received a postal card (Ex. R., p. 43) which led the deponent to believe that he could buy Pocahontas coal from defendant and that in *subsequent correspondence* Coffman "represented his alleged company's coal as Pocahontas coal" and also "represented the coal of said company to be *the same as that* BEING *placed upon the market or offered by* said Castner & Curran." The statements of these deponents are the strongest that can be found in complainant's record.

WHY HAS NOT THE COMPLAINANT PRODUCED THE "SUBSEQUENT CORRESPONDENCE"? In the advertising device (Exhib. R), which accompanies the deposition of Stockham (pp. 42 and 43), there is the statement that the defendant had recently contracted to take the entire output of a large mine. The date of this device is November 16, 1896. Defendant began selling Indian Ridge Company's coal November 1, 1896, so that the statement of this device may be reasonably assumed to refer to that mine, and in that sense he

could say *truthfully* that the coal which he offered was the same that *had been* offered by Castner and Curran. It will require the production of the subsequent correspondence to show that he said anything stronger than that. As two of these witnesses are selling agents for the appellant and as the subsequent correspondence is not produced, it seems to leave the complainants case without positive proof of misrepresentation. It is not necessary to add that unfair competition cannot be presumed nor assumed; it must be *positively established.*

Secondary Meaning.

CAN A GEOGRAPHICAL TRADE NAME APPLIED TO A NATURAL PRODUCT OF THE LOCALITY INDICATED BY SAID NAME ACQUIRE SUCH A SECONDARY MEANING AS TO IDENTIFY ONE PRODUCER OF THAT PRODUCT AMONG OTHER RIGHTFUL PRODUCERS THEREOF IN THE SAME LOCALITY?

The determination of this interrogatory involves the consideration of the question of law presented in this case. The facts upon which the interrogatory is based and which constitute the cause for making the interrogatory are perhaps best stated by the Honorable Court in the first circuit through Judge Putnam as follows:

"We do not, however, find it necessary to decide at present whether or not any qualification of that nature would be applicable to the case at bar, because so sharp a question does not now arise. Some of the reasons which render it necessary, under some circumstances, to protect, at least to a qualified extent, a trade mark of a geographical origin, was given by us in Levy *vs.* Waitt, 61 Fed. Rep., 1008, 1012."

Then after citing the general rule from Columbia Co. *vs.* Alcorn and an explanation thereof from Canal Co. *vs.* Clark, the Court says:

"It is necessary to recognize carefully the distinction which these expressions imply. Otherwise, a manufacturer, pro-

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ducer, or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct. Therefore, even under the rule as stated in the Columbia Mills Company *vs.* Alcorn, *ubi supra*, and without the qualification recognized in Singer Manufacturing Company *vs.* June Manufacturing Company, *ubi supra*, the case at bar as presented to the court below and also to this court, involves a difficult question of fact to the effect whether, at the time the trade mark or trade name in question was adopted the word Pocahontas was in common use as designating a known locality, or whether the locality gained its name from the complainants. Therefore, the Circuit Court was not met with a pure question of law, but with a mixed question of law and fact; and, by the well settled principles touching the granting of temporary injunctions, the court was fully justified in its action by the long and unbroken public acquiescence, without reference to the adjudication in the Fourth Circuit to which we have referred."

It seems then that the facts on which is based a request for the modification of a long established rule of law are—

"a manufacturer, producer or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct."—

unless he be permitted to enjoy the exclusive use of the name of that locality as his trade mark. Let it be remembered that even with these facts existing the protection suggested is to be "only to a qualified extent."

Taking the interrogatory in its full meaning and recalling the nature of the product and the name of the locality of its production, it appears to be absolutely true that with

only the name of the locality as a trade mark, there can possibly be nothing else to identify a particular producer or dealer except his name appearing in connection with the trake mark. It must be "Pocahontas—Castner & Curran," or "Pocahontas Coal—W. H. Coffman." There is no cut, illustration or picture used in connection with the name of the locality which would identify the dealer as soon as the trade became conversant with it. There is nothing but the name of the locality and the name of the dealer. Now the question is: *Can there be devised a qualification of the rule which shall make* "POCAHONTAS," *separate from the name of the dealer, identify that dealer?* It seems to be impossible in the very nature of things concerned. Would it be just to try this plan of qualification—all of the dealers other than Castner & Curran shall place upon their letter heads, bill heads and shipping cards "Pocahontas Coal—John Smith, Proprietor—This coal was not inspected by Castner & Curran"? Must all the other dealers give Castner & Curran a left-handed advertisement on their bills, postal cards, advertising devices and car labels?

Take the circumstances formulated by the honorable Court in the first circuit. Take a dealer who furnishes such an excellent quality of goods that they build up so extensive a trade as to give a distinctive name to the locality where it is produced. The facts so far as stated existed in the Glendon Iron Co. case and the exculsive use of the word Glendon was denied. So far no new reason appears for qualifying the rule, but the facts formulated by the Court *are not paralleled in the case at bar.* March 1, 1882, the first blast in Mine No. 1 occurred, and on June 30, 1882, an officially designated and *voluntarily named* post office by the name of Pocahontas was established and the first coal was not shipped until 13 months *thereafter.* The sale of coal of excellent quality had *not* built up *so extensive a trade* as to

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give a distinctive name to the locality. But the dealer would be defeated of the just fruits of his own meritorious conduct. The dealer of the case at bar TEN YEARS after this honorable tribunal had announced the rule, that the name of a locality could not be monopolized as a trade mark, not only boldly seizes upon the name of the locality for a natural product produced there, but boldly seizes it *after* he has *dedicated* it as the name of that locality. Does this constitute *meritorious* conduct? Is the requirement that he shall adhere to his original dedication of that name as the name of the locality defeating him of any of the *just* fruits of his *meritorious* conduct?

It seems to be clearly established that this is not a case requiring a qualification of the rule. If the rule should be qualified by reason of the existence of all and every one of the facts formulated by the honorable court in the first circuit, it would have been qualified in the Glendon Iron Case, but it seems too much to ask this honorable tribunal to weaken the foundation or mar the outline of that brilliant beacon in commercial life set up in Canal Co. *vs.* Clark.

There must be some other motive than the mere exclusive use of this word Pocahontas. What that motive is is fully shown upon the record. It is shown by the proof and pleadings that the complainant is attempting to monopolize the coal trade of that vast section of over 000 square acres, to suppress competition and to force all the collieries of that section to employ them as agents. The second paragraph of Exhibit A, producers' contract (par. 1, p. 17), reads: "The producers shall consign their entire product of coal intended for rail transportation other than that used for coke to the general coal agent," the complainant, while paragraph marked "3" on the same page and of the same contract reads: "Such general tide-water agent shall agree not to sell or deal in bituminous or

semi-bituminous coal other than that transported by and over the line of the railroad company," the Norfolk and Western Railroad. Paragraph (*a*) of the same contract (third paragraph from bottom of page 18 of record) reads: "The railroad company shall receive a sum equal to seventy (70) per cent. for transportation, and shall not hold the producers liable therefor." Paragraph marked "Fourth" on page 19 reads: "The parties hereto agree that during the existence of this contract they will make no sale of coal lands or mining rights or leases for coal operations, except upon the expressed condition that the purchaser, lessee or sub-lessee, shall become a party to this agreement." Paragraph "Fourth" of Exhibit B, Tidewater Coal Contract (p. 23) reads: "Castner & Company, Limited, will not sell or deal in bituminous or semi-bituminious coal other than which shall be transported by and over the line of the railroad company." Similiar restrictions occur in clause three of Exhibit Contract D between complainant and the Pulaski Iron Company.

These references are made for the purpose of showing the correctness of the prophecy of this high tribunal in Canal Co. *vs.* Clark to the effect that to give exclusive right to the use of the name of a locality as a trade name for a product of that locality would lead to mischievous monopolies.

In conclusion it is respectfully submitted that the complainant has no equity in his bill; that the word "Pocahontas" was originally dedicated to the public as the name of the locality where Pocahontas coal is produced; that the mining industry did not give the name to the locality, but on the contrary that the name of the locality was given to the product of that industry; that the title alleged by the complainant is cloudy; that no continuous, unbroken public acquiescence in any exclusive use of that word by the complainant has existed, and that, therefore, the complain-

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ant's allegations of an exclusive right fall to the ground. It is further submitted that no instance of misrepresentation, fraud or unfair competition of any kind whatever has been proven against the defendant appellee. It is also submitted that the facts existing in this case do not call for a qualification of the established rule, and that the bestowal upon these complainants of any right to the use of the word Pocahontas as a trade name for coal in the Pocahontas Flat Top Coal Region must, in the very nature of the facts and conditions involved, be an *exclusive* right to use such word for that purpose, because it cannot be used in a *qualified* manner, when unaccompanied by any cut, illustration or additional mark, sign or symbol.

And finally, any right, exclusive or otherwise, even if a qualified right were possible in the nature of things, granted to the complainant would result in a mischievous monopoly and would put upon a vast majority of one class of people, the producers in that field, the onus of distinguishing each of themselves from this complainant who constitutes but one of the class. In this sense it seems that it would be against public policy and whatever may be the conclusion of this Honorable Court as to this feature, it is submitted that the defendant, appellee, in all of his business transactions has been so exceedingly careful that he has not made any false representations as to the product in which he deals. He has felt and believed, as a majority of the producers there have felt and believed, that he has the right to use the name of his post office, town and section of country, as the public at large all over the world has persistently used that name, to distinguish a particular kind of coal by the name of the locality in which it is produced. All the world over the coal is Pocahontas coal just as other coals are Lehigh Valley, Hocking Valley, Cumberland, Pittston, Connellsville, New River, George's Creek, and that of a hundred other coal producing localities, domestic and foreign.

Dismissal of the Bill.

It is not thought necessary to enter at any length into a consideration of the dismissal of the bill by the Honorable Court in the fourth circuit from an appeal upon an order granting a preliminary injunction. In fact, the cases cited by the complainant show clearly that this is a matter entirely in the discretion of the court. It would seem to be inconceivable that any court could do otherwise after finding, without doubt, that the complainant had no exclusive right in the use of their alleged trade mark and after having before it ample evidence to sustain this finding and the total lack of evidence of unfair competition. If the court had remanded the case for taking further testimony, this would have been not only permitting but directing the continuance of expensive and harassing litigation to the great injury of not only the defendant, appellee, but of other producers who desire to use the same geographical name in connection with the coal which they produce in the locality of that name.

Complainant originally pleaded not only exclusive right to the mark involved and unfair and deceptive competition, but submitted affidavits in support thereof. Having made the plea and presented evidence on both of these two points it seems too late for them now to urge the privilege of virtually reopening the case *ab initio* for the purpose of producing cumulative evidence. Being clear that exclusive right to the mark involved was not established, it would seem to be the better policy to maintain the act of dismissal of the bill performed in the discretion of the Court, as there is nothing to show that that discretion was not properly exercised.

Respectfully submitted,

E. B. STOCKING,

Counsel for Coffman, Appellee.

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IN THE UNITED STATES SUPREME COURT.

No. 113.

CASTNER & CURRAN *vs.* W. H. COFFMAN. } Subject: Trade-Mark "Pocahontas" Coal.

Memorandum of Authorities Referred to by Counsel for Coffman During Oral Argument.

MAY IT PLEASE THE COURT:

At the request of this Honorable Court, through its Honorable Chief Justice, the following memorandum of authorities is presented, as they do not appear in the printed brief or argument submitted, but do appear in the public documents mentioned by the counsel for the defendant in his oral argument at the hearing of this cause:

As showing the existence of an official post office named Pocahontas, in Somerset County, Pa., prior to 1878, see U. S. Official Postal Guide, No. 17, 1878. This also shows that there existed in 1878 five other post offices bearing the name of Pocahontas.

As further showing that at least one of these post offices is in a coal mining section, to wit: Pocahontas, Somerset County, Pa., reference was made to the official records of the U. S. Geological Survey, entitled "Pennsylvania Second Geological Survey—County Geological Maps" (Map 50—Somerset County) and to the records of the department relating thereto.

Respectfully submitted,

E. B. STOCKING,

Counsel for Coffman.